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No. 89-1632

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF CALIFORNIA, PETITIONER

v.

HODARI D.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a police officer's pursuit of an individual who flees at the sight of the officer constitutes a "seizure" under the Fourth Amendment before that individual's flight has been halted.

2. Whether drugs that a suspect abandons during his flight from a police officer are subject to suppression as the fruits of an unlawful seizure.

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INTEREST OF THE UNITED STATES

This case presents two questions regarding the role of the Fourth Amendment when police pursue an individual who flees as the police approach. The resolution of those questions is likely to affect federal prosecutions under the drug and firearms laws, as well as cases arising in the District of Columbia and on federal reservations, where federal agencies have general law enforcement responsibilities.

STATEMENT

1. On April 18, 1988, at about 10 p.m., Officers Brian McColgin and Jerry Pertoso of the Oakland Police Department's Drug Task Force were on patrol in their un-

marked car in a high crime area of Oakland. Both officers wore blue jackets with the word "Police" on the front and back. Tr. 1-2. As the officers turned onto one of the streets in the area, they saw four or five young men huddled around a small red car parked at the curb. Two of the youths looked at the officers' car and immediately began running away. The red car then drove off quickly, and the other youths ran off as well. Tr. 3-4, 12-13. Suspecting that illegal drug activity was afoot, the officers decided to pursue the youths to "find out who they were and what their purpose was for being there in the area." Tr. 4, 13-14, 17.

Officer Pertoso left the car and circled around to the back of the block where several of the youths had run. Tr. 4, 13-14. Officer McColgin drove around the block in the opposite direction. Tr. 4. As Officer Pertoso approached from the rear, he saw respondent running toward him while looking back over his shoulder as he ran. Tr. 14. When Officer Pertoso and respondent were about 11 feet apart, respondent turned forward, saw the officer, and looked startled. Before Officer Pertoso could say or do anything, respondent made a backward scooping motion with his hand and threw "a single loose rock" onto the sidewalk. Tr. 15, 18. Suspecting that the rock was "crack" cocaine, Officer Pertoso apprehended respondent, who had continued running toward him. *Ibid.* Officer Pertoso forced respondent to the grass, handcuffed him, and radioed Officer McColgin. Tr. 5, 15. McColgin arrived and retraced respondent's route back to where the officers had first seen the youths. Along the way, he found a plastic baggie containing 15 chunks of cocaine. Tr. 5-6, 73-77. The rock discarded by respondent also proved to be cocaine. *Ibid.* A search of respondent uncovered $130 in cash and a pager. Tr. 71-72.

2. A juvenile proceeding was brought against respondent, charging that he had possessed cocaine and violated a curfew. Respondent moved to suppress the cocaine. After an evidentiary hearing, the court denied the motion. Tr. 62. The court did not issue an opinion or give a formal statement of its reasons. The court's comments indicated, however, that it believed respondent had been unlawfully seized, but had voluntarily discarded the cocaine. Tr. 28-61; Pet. App. 4-5. The court then sustained the charges in the petition and committed respondent to a county facility for five years and eight months. Tr. 82-83.

3. The California Court of Appeal reversed the judgment of wardship, ruling that the cocaine the officers had seized on the ground along respondent's path should have been suppressed as the product of an illegal seizure. Pet. App. 1-19. The court held that respondent was "seized" when he saw Officer Pertoso "running directly at him," because "it is coercive and intimidating to discover a police officer running directly toward one, some 11 feet away on a public sidewalk." Pet. App. 8-9. Police pursuit amounts to a "seizure," the court explained, when the officers give chase "in a manner designed to overtake and detain or encourage the individual to give up his flight," even if that person is still fleeing from the officers. Pet. App. 9.[1]

The court also ruled that respondent's decision to abandon the cocaine was the direct product of the officer's illegal seizure of respondent, and was not an independent act of respondent's free will. Pet. App. 15-19. The court therefore ordered the suppression of all the cocaine, including the rock that respondent threw down shortly after he saw

[1] Even if a physical restraint were necessary, the court ruled, Officer Pertoso's actions were "tantamount to a physical seizure," because the officer's conduct "sufficiently blocked" respondent's "physical freedom of movement." Pet. App. 12 n.4.

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Officer Pertoso and the bag of cocaine that was later found along the route respondent had followed as he ran away from the vicinity of the red car. Pet. App. 19.[2]

4. The California Supreme Court denied the State's application for review. Pet. App. 21.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Respondent was not arrested until Officer Pertoso saw him discard what the officer believed to be a form of cocaine base known as "crack." At that point, Officer Pertoso had probable cause to arrest respondent for illegal possession of drugs. Accordingly, unless the officers' prior actions violated the Fourth Amendment, that piece of crack, as well as the plastic baggie of crack that the officers later discovered along the path of respondent's flight, was admissible as evidence.

The California Court of Appeal held that Officer Pertoso's pursuit of respondent became a "seizure" within the meaning of the Fourth Amendment when respondent saw Officer Pertoso "running directly at him." Pet. App. 8. The court so held even though at that time respondent was still attempting to make good his escape.

That conclusion, we submit, gives an unduly broad reading to the term "seizure." In our view, a "seizure"

[2] In addition, the court held that the officers lacked reasonable suspicion to justify temporarily detaining respondent. Pet. App. 12-15. The court held that respondent's flight alone was insufficient to constitute reasonable suspicion, Pet. App. 13-14, and that the location of the event in an area known for drug activity was also insufficient to justify a temporary detention. The State has not raised the reasonable suspicion argument in its petition, and for that reason we have not discussed it here. We believe, however, that the court's analysis of that issue was incorrect, for the reasons we have discussed in our briefs in *Michigan* v. *Shabaz*, 478 U.S. 1017 (1986) (No. 85-1265), and *Michigan* v. *Chesternut*, 486 U.S. 567 (1988) (No. 86-1824).

occurs when (1) the police have physical control over an individual, or (2) the police in some manner direct the individual to stop and he complies with the command. In the latter case, the seizure occurs at the time that the suspect accedes to the police command, since it is from that time that the suspect is effectively under police control.

The distinction between the test we propose and the test applied by the California Court of Appeal is a subtle one that is not likely to make a difference in the analysis or the outcome of most cases. There is one class of cases, however, in which the distinction *will* make a difference: where the suspect ignores the command to stop, and the police obtain legal grounds for stopping the individual after he flees but before he is apprehended.

If, as the Court of Appeal held, the seizure occurs at the time the officers first unsuccessfully order the individual to stop, the evidence ultimately obtained will be subject to suppression if the court finds that the officers did not have a legal justification for the stop at the time of the initial order. That will be true even if the events that occur between the time of the officers' command to stop and the eventual apprehension of the individual give the officers ample justification for the seizure. On the other hand, if the seizure occurs only when the officers obtain physical control over the individual or the individual complies with their order to stop, evidence obtained as a result of the seizure will be admissible as long as the officers have a sufficient legal basis for the seizure at the time they gain control over the individual, either by force or acquiescence.

The common understanding of the term "seizure," both today and at the time the Fourth Amendment was adopted, strongly supports the view that an individual is "seized" only when the police succeed in obtaining actual or constructive control over his movements. No seizure occurs when the police fail in their efforts to restrain him.

There may have been an "attempted seizure" in such cases, but it could hardly be said of a policeman who returns empty-handed to the station after a chase that he "seized" the fleeing suspect.

Under the test we propose, it is clear that Officer Pertoso did not "seize" respondent until the officer obtained physical control over him. Even if Officer Pertoso's actions could be regarded as clearly indicative of his determination to detain respondent, respondent did not acquiesce in that effort, but kept running until he was physically restrained, at which time he had thrown down the rock of crack and thereby given Officer Pertoso probable cause to arrest him. The seizure of respondent was therefore lawful, since Officer Pertoso's conduct did not at any point violate the Fourth Amendment's proscription against unreasonable seizures.

2. Even if the Court of Appeal was correct in holding that Officer Pertoso's pursuit of respondent resulted in a seizure prior to the time respondent threw away the cocaine he was carrying, and even if the court was correct in holding that the seizure of respondent was not supported by reasonable suspicion at the time the seizure is deemed to have occurred, the court was still wrong in suppressing the cocaine. Evidence seized following an unlawful search or seizure is subject to suppression only if it is obtained through exploitation of the illegal police conduct; if the evidence is obtained through means sufficiently independent of the illegal conduct to be freed of the taint of that conduct, suppression is not appropriate.

In this case, the baggie of cocaine found along respondent's path is clearly not the product of the seizure that the court determined to have occurred in this case when Officer Pertoso suddenly appeared only a few feet in front of respondent. Respondent's decision to abandon the cocaine may have been the product of concern that the police

would find him in possession of cocaine, but it could not have been the product of any unlawful police action that had occurred at that time.

Similarly, respondent's decision to throw down the rock of cocaine that was found nearby following his arrest constituted an independent act of free will on respondent's part. It may have been precipitated by the sudden appearance of Officer Pertoso, but it was not the fruit of any unlawful action on Pertoso's part, as would have been the case, for example, if Officer Pertoso had found the cocaine during an unlawful search of respondent's person after seizing him.

ARGUMENT

I. RESPONDENT HAD NOT BEEN "SEIZED" FOR PURPOSES OF THE FOURTH AMENDMENT WHEN HE DISCARDED THE COCAINE

A. Police Pursuit Of An Individual In Flight Does Not Constitute A Seizure Unless The Police Intentionally And Successfully Impede The Individual's Freedom Of Movement

1. The California Court of Appeal correctly ruled that police pursuit of a suspect, without more, is not a "seizure." This Court expressly so held in *Michigan* v. *Chesternut*, 486 U.S. 567 (1988). In that case, the defendant saw a police patrol car driving along the street in his direction and, without any provocation from the officers, ran away from it. The officers followed the defendant in their car and watched him discard packets of drugs as he ran. At his trial for drug possession, the defendant claimed that the drugs should be suppressed because he had been "seized" once the officers decided to pursue him. The Court rejected that argument. 486 U.S. at 574. The Court acknowledged that a police officer's presence and pursuit "could be somewhat intimidating," but nonetheless

held that the officers' conduct in that case did not constitute a "seizure," since the officers did not take any of the coercive steps that police ordinarily use to apprehend a suspect: The officers did not activate their car's siren or flashers; they did not command the suspect to halt; they did not display a weapon; and they did not operate their car in an aggressive manner in order to block the suspect's course or control the speed or direction of his movement. *Id.* at 575. The officers' conduct, the Court found, was not "so intimidating" that a person "could reasonably have believed that he was not free to disregard the police presence and go about his business." *Id.* at 576 (quoting *INS* v. *Delgado,* 466 U.S. 210, 216 (1984)).

The California Court of Appeal read *Chesternut* to hold that a person in flight can be "seized" if the police engage in intimidating conduct indicating their intention to detain him, regardless of the suspect's response. The court noted that *Chesternut* declined to adopt the "bright-line rule" endorsed by the State in that case, under which police conduct would not constitute a "seizure," regardless of the nature or degree of coercion involved, "as long as the police did not succeed in actually apprehending the individual." 486 U.S. at 572. Relying on that passage in *Chesternut,* the Court of Appeal concluded that a person is "seized" at the moment the police communicate to him their intent to restrain his movement, even if the person ignores the police efforts to stop him or endeavors to elude the officers.

Although it is true that the Court in *Chesternut* declined to adopt the "bright-line" test proposed by the State in that case, the Court did not reject the State's test as a matter of law. Rather, the Court found it possible to decide the *Chesternut* case without the need to adopt or reject the test proposed by the State; as the Court explained, it "determine[d] only that, in this particular case, the police conduct in question did not amount to a seizure." 486 U.S.

at 573. The Court pointedly left "to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." *Id.* at 575-576 n.9.

Chesternut therefore does not foreclose the conclusion that a person still in flight has not been "seized," regardless of police efforts to stop him. Rather, *Chesternut* simply stands for the proposition that coercive or intimidating conduct, which was absent in that case, is a *necessary* condition for a "seizure." It does not stand for the much broader proposition that such coercive or intimidating conduct is a *sufficient* condition for a "seizure."

Our understanding of *Chesternut* is consistent with that of the concurring Justices in that case, who interpreted the opinion as leaving open the question whether a seizure can occur without physical control by the police or acquiescence by the suspect. See 486 U.S. at 576-577 (Kennedy, J., concurring). That understanding of *Chesternut* is also consistent with the Court's decision the following Term in *Brower* v. *County of Inyo,* 109 S. Ct. 1378 (1989), which clearly indicated that a person who is still in flight has not been seized.

In *Brower,* a person attempting to escape from the police in a stolen car crashed into a roadblock that was designed to bring him to a halt. The Court held that under those circumstances, the driver had been "seized" by the officers. In so ruling, the Court emphasized that a Fourth Amendment "seizure" requires the acquisition of control, *i.e.,* an actual restraint on the suspect's freedom of movement. The Court said that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control," 109 S. Ct. at 1381, and that "a Fourth Amendment seizure [occurs] * * * only when there is a governmental termination of freedom of movement through means intentionally applied," *ibid.* (emphasis omitted). *Brower* thus supports the conclusion that a person in flight, like respondent, has not been "seized" unless and until his escape attempt is foiled.

2. Historical evidence from the Nation's formative period provides further support for this view. The historical evidence reveals that the term "seizure" has traditionally been understood to require actual control over the person or thing seized and could not reasonably be said to include someone, like respondent, who was in flight. Eighteenth and nineteenth century dictionaries, for example, defined the term as requiring actual control over the person or thing seized.[3] Moreover, it was well understood that the term "arrest," which was used interchangeably with the term "seizure" in several colonial constitutions,[4] required the obtaining of control over the arrested party.[5]

[3] Samuel Johnson's renowned 2 *Dictionary of the English Language* (1755) (facsimile ed. 1968) defined "seize" as "To take possession of; to grasp; to lay hold on; to fasten on," and defined "seizure" as "The act of taking forcible possession. • • • Catch." Noah Webster's 1828 dictionary defined the term "seize" as "1. To fall or rush upon suddenly and lay hold on; or to gripe or grasp suddenly. 2. To take possession by force • • • 3. To take possession by virtue of a warrant or legal authority." 2 *American Dictionary of the English Language* 67 (1st ed. 1828) (facsimile ed. 1985). The example given is "The hawk seizes a chicken with his claws. The officer seizes a thief." *Ibid.* The dictionary that later became the Oxford English Dictionary defined the word "arrest" as To stop and lay hold of. • • • To catch, capture, seize, lay hold upon. • • • To capture, seize, lay hold upon, or apprehend by legal authority • • •." 1 *Murray's New English Dictionary* 460 (1888). That dictionary also defined the word "seize" as "To take possession of (goods) in pursuance of a judicial order; To take possession of by force; to capture; To take prisoner, to catch; To take hold of with the hands, claws, teeth, etc." 8 *Murray's New English Dictionary* 403 (1914).

[4] See Mass. Decl. of Rights of 1780, art. XIV; Md. Decl. of Rights of 1776, art. 23; Vt. Const. of 1777, ch. I, § 11; N.H. Bill of Rights of 1784, § 19.

[5] See *United States* v. *Benner*, 24 F. Cas. 1084, 1086 (C.C.E.D.Pa. 1830) (No. 14,568) ("An arrest is the taking, seizing or detaining the person of another, touching or putting hands upon him."); 1 *Murray's New English Dictionary* 460-461 (defining "arrest" as "[t]he act of standing still, halting, or stopping; stoppage, stop, halt, delay. • • • The act of stopping anything in its course. • • • The apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime."); 1 N. Webster, *supra*, at 13 (defining "arrest" as "To obstruct; to stop; to check or hinder motion. To take, seize or apprehend by virtue of a warrant."). As a matter of original understanding, one could not be arrested – or seized – until he was in the physical custody of the seizer and within his control.

Court decisions in other areas of the law manifest the same understanding. When discussing the "seizure" of tangible items, the courts uniformly interpreted that term to contemplate control over the item seized. As this Court wrote in *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906), "a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner." See also, *e.g.*, *Pelham* v. *Rose*, 76 U.S. (9 Wall.) 103, 106 (1870) ("by the seizure of a thing is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized. As applied to subjects capable of manual delivery, the term means caption; the physical taking into custody.").

Many early maritime cases turned on whether a ship had been seized, and the use of the term in that context is consistent with the test we propose under the Fourth Amendment. In *The Josefa Segunda*, 23 U.S. (10 Wheat.) 312 (1825), the Court considered the competing claims of persons who asserted that they had seized the ship and were entitled to the proceeds of the sale of the cargo.

> It is not sufficient [for a claim of seizure] that [the would-be seizer] intended to make one, or that, on some occasions, he expressed to third persons that he had so done. There must be an open, viable possession claimed, and authority exercised under a seizure. The parties must understand that they are dispossessed,

and they are no longer at liberty to exercise any dominion on board of the ship.

Id. at 325.

That explanation of "seizure" comports with the dictionary definitions. Indeed, most cases involving ship seizures use the term to mean physical taking over and control of the ship. See *The Caledonian,* 17 U.S. (4 Wheat.) 100 (1819); *The Saratoga,* 9 F. 322 (S.D.N.Y. 1881); *United States* v. *The Henry,* 26 F. Cas. 277 (C.C.S.D.N.Y. 1859) (No. 15,352) ("It may be that there was such an interference with the vessel by the officers * * * as would, though falling short of a technical seizure, subject them to an action by the claimant."); *Le Tigre,* 15 F. Cas. 404 (C.C.D.N.J. 1820) (No. 8281); *The Bolina,* 3 F. Cas. 811, 813 (C.C.D. Mass. 1812) (No. 1608) ("It has been also slightly contended, that upon the facts there was no seizure, but a mere possession and detention: but the possession was diligently followed up by an information of forfeiture: and it seems to me to have been as full and complete as any seizure could be"); *Barney* v. *Maryland Ins. Co.,* 5 H. & J. 139 (Md. 1820).[6] In sum, at common

[6] Early American courts typically used the term "seize" in the same sense in civil cases as well. For example, in cases of attachment of personal belongings to satisfy a debt or judgment, sheriffs were required to "seize" the property. In *Train* v. *Wellington,* 12 Mass. 494, 497 (1815), the Massachusetts Supreme Judicial Court said that "to constitute an attachment, there must be an actual seizing of the goods by the officer; not that every article must be taken hold of, but that he must be in view of the whole, with the power of taking them into his actual possession." Likewise, in a case involving the seizure of property to satisfy a lien, the Louisiana Supreme Court said that "[t]here must be * * * an act of taking possession of the property; the thing seized must be put in the hands of the officer; otherwise, the seizure is incomplete, or rather, there is no seizure." *Goubeau* v. *New Orleans & Nashville Ry.,* 6 Rob. 345, 347 (La. 1844). The court in *Goubeau* turned to the dictionary to ascertain the meaning of the word.

law the concept that someone could be in flight and yet also be "seized" would have been unfathomable.

3. The line of this Court's decisions beginning with *Terry* v. *Ohio,* 392 U.S. 1 (1968), is consistent with the rule we propose. In *Terry,* the Court noted that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." 392 U.S. at 19 n.16. An actual restraint on liberty is therefore required before a citizen will be regarded as "seized."

In *Terry*'s wake, this Court has decided a large number of cases in which the issue was whether, in the context of a citizen-police encounter, the citizen has been intimidated into forgoing his right to leave or instead has voluntarily elected to cooperate with the authorities. In that context, the Court has applied the so-called *Mendenhall* test, drawn from Justice Stewart's opinion in *United States* v. *Mendenhall,* 446 U.S. 544 (1980). That test provides that in assessing a police-citizen encounter in which the citizen is apparently cooperating with the police, the police can be said to have seized the citizen "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. at 554 (opinion of Stewart, J.); see also *Florida* v. *Royer,* 460 U.S. 491, 497, 501 (1983) (plurality opinion); *id.* at 514 (Blackmun, J., dissenting); *id.* at 523 n.3 (Rehnquist, J., dissenting); *INS* v. *Delgado,* 466 U.S. at 216-217, 219-221; *Florida* v. *Rodriguez,* 469 U.S. 1, 5-6 (1984).

The *Mendenhall* test is suitable for resolving the frequently recurring case in which the question is whether a person remained in an officer's presence because he was intimidated (and therefore was "seized") or because he was being cooperative (and therefore was not "seized").[7]

[7] The test takes into account the fact that many people will cooperate with a reasonable request by a police officer to answer some questions, or to supply some identification, whether out of a sense of civic

It is only when the officer's conduct becomes "so intimidating" that a reasonable person would conclude that he is not "free to leave" that a Fourth Amendment "seizure" occurs. *INS* v. *Delgado*, 466 U.S. at 216; *Chesternut*, 486 U.S. at 577 (Kennedy, J., concurring) ("A Fourth Amendment seizure occurs when an individual remains in the control of law enforcement officials because he reasonably believes, on the basis of their conduct toward him, that he is not free to go.").

The *Mendenhall* test, however, does not address the very different issue presented in a case such as this one, where the individual has fled for the very purpose of avoiding the police. In that setting the court is not faced with the question whether the individual has remained in the presence of the officers as a matter of compulsion or choice. Instead, the court is faced with the quite distinct question whether the individual is under police control at all. If he is not, then regardless of the police efforts to apprehend him, he has not been seized.

In *Chesternut*, the Court was able to apply the *Mendenhall* test because the police conduct, objectively viewed, did not manifest an intention to seize the suspect; it was therefore unnecessary for the Court to ask the quite distinct question whether the suspect was effectively under police control. But the fact that the Court applied the *Mendenhall* test in *Chesternut* does not mean that a suspect has been seized the moment the police communicate to him that they intend to take him into custody. An all-points-bulletin directing the arrest of a suspect who is at large does not constitute a "seizure" if the suspect happens to be listening on his police scanner. Rather, when an individual flees or refuses to respond to police commands to stop, he is not "seized" within the meaning of the Fourth Amendment until and unless the police succeed in bringing him under their control.

B. The Pursuit Of Respondent Did Not Constitute A Seizure

The Court of Appeal regarded as significant to its finding of a seizure that Officer Pertoso was running toward respondent when respondent saw him.[8] But that indicates nothing more than that the officer was pursuing respondent and that the chase was almost at an end. In every "pursuit" case in which the timing of the seizure is at issue, the officer will be running directly toward the suspect, although ordinarily the officer will be chasing him from behind.

The Court of Appeal did not suggest that respondent acquiesced in what he perceived to be Officer Pertoso's effort to apprehend him. Therefore, this case, which arises at the end of the chase, shortly before the officer obtained custody of the suspect, is not analytically different from a case arising at the beginning of the chase, when the officer first begins to pursue the suspect and the suspect first begins to flee. In this case, the record makes it clear that from the time the pursuit began until Officer Pertoso wrestled respondent to the ground, respondent was refusing to acquiesce in the officer's effort to apprehend him. Respondent was therefore not seized until the moment of his capture.

It is likely that respondent believed that it was not safe to remain standing near the red car because he was in possession of narcotics at the time. And respondent may well have anticipated that the officers were about to approach him. But regardless of his subjective impressions, respondent was free throughout—in the sense contemplated by *Terry*—to act as he chose: to remain on the street, to walk away, or even to run. 392 U.S. at 19 n.16.

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duty, an inclination to cooperate with the authorities, or the belief that a refusal to cooperate will focus suspicion on them.

[8] The court correctly disregarded the actions taken by the officers to encircle and head off respondent—what the court called a "police pincer maneuver"—because respondent was unaware of what the officers were doing. Pet. App. 8. Police conduct of which a suspect is unaware cannot render him "seized" under the Fourth Amendment. *Chesternut*, 486 U.S. at 575 n.7.

It is likely also true that respondent believed that he could not escape once he spotted Officer Pertoso in his escape path. As it turned out, he was correct. But the officer did not bring to a halt respondent's attempt to escape until after respondent had discarded the drugs, and that fact is critical. Until then, there was no "governmental termination of freedom of movement through means intentionally applied," *Brower*, 109 S. Ct. at 1381 (emphasis omitted), which is necessary before there can be a Fourth Amendment seizure.

II. THE COCAINE RESPONDENT DISCARDED DURING HIS FLIGHT FROM THE OFFICERS SHOULD BE ADMITTED EVEN IF RESPONDENT HAD PREVIOUSLY BEEN UNLAWFULLY SEIZED

Even if Officer Pertoso is deemed to have seized respondent when respondent saw him, and even if the seizure is regarded as unlawful, the drugs recovered by the officers should have been admitted nonetheless. Evidence is not the " 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). The police must exploit that illegality in some manner before evidence becomes so tainted, and an intervening act by the suspect himself can break the causal chain. See *id.* at 486; *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975). Respondent engaged in just such an intervening act in this case.

The Court of Appeal determined that the officers recovered the drugs "through exploitation of their illegal activity" and "as a direct result of that action," Pet. App. 18, but that conclusion is mistaken. To begin with, the court did not distinguish between the drugs respondent jettisoned *before* he saw Officer Pertoso, which Officer McColgin retrieved when he retraced respondent's escape route, from the drugs that respondent discarded *after* he

saw Officer Pertoso. That distinction is important since respondent plainly had not been "seized" when he abandoned the bag of crack along his escape route. That bag should not have been suppressed, because the officers did not obtain it as the result of an unlawful seizure of respondent. See *Nix* v. *Williams*, 467 U.S. 431, 444 (1984) ("cases implementing the Exclusionary Rule begin with the premise that the challenged evidence is *in some sense* the product of illegal governmental activity."). Respondent freely abandoned that bag; it therefore was not the fruit of any subsequent unlawful seizure.

The "single loose rock" respondent threw away once he saw Officer Pertoso is also admissible, under the authority of this Court's decision in *Hester* v. *United States*, 265 U.S. 57 (1924). There, federal officers, suspecting Hester of bootlegging, watched from the open fields surrounding Hester's home as he handed a bottle of "moonshine whiskey" to someone else. When an alarm went out, Hester fled, but he and the other person dropped the bottle and a jug as they ran. Hester later moved to suppress the officers' testimony on the ground that their conduct violated the Fourth Amendment. This Court rejected his argument, reasoning that "[i]t is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search and seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned." *Id.* at 58.

Hester demonstrates that the Court of Appeal erred. In the passage quoted above, this Court assumed that the officers had committed an unlawful search by trespassing on Hester's property, but nonetheless concluded that it was Hester's and his associate's "own acts" that disclosed the

whiskey.[9] The same is true here. Just as the agents' presence convinced Hester that he should give up the moonshine business, Officer Pertoso's presence along respondent's escape route convinced him that it was unwise to possess cocaine. But here, as in *Hester*, the evidence was recovered because of respondent's "own act" of throwing it away before he ran into Officer Pertoso. Officer Pertoso did not exploit the seizure to obtain the drugs, because he did not obtain the drugs through a search of respondent. Rather, he found the rock of crack cocaine in plain view where respondent threw it. Accordingly, the rock of crack cocaine was admissible even if Officer Pertoso's actions in pursuing respondent were unlawful.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted.

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[9] Later in the opinion the Court held that there was no unlawful search, since the "open fields" are not part of the home. 265 U.S. at 59. But the Court made that point independently of the one discussed in the text.

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